No. (1)

IN THE

Supreme Court, U.S.
FILED
04-6389 JUN 3 - 2005
OFFICE OF THE CLERK

Supreme Court of the United States

OCTOBER TERM, 2005

VICTOR CHEHEBAR,
Petitioner,

–against–

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

NATHAN Z. DERSHOWITZ*
VICTORIA B. EIGER
DERSHOWITZ, EIGER
& ADELSON, P.C.
220 Fifth Avenue, Suite 300
New York, NY 10001
(212) 889-4009

ALAN M. DERSHOWITZ
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 496-2187

* COUNSEL OF RECORD

Attorneys for Petitioner
VICTOR CHEHEBAR

QUESTION PRESENTED FOR REVIEW

Is an appeal waiver provision in a plea agreement enforceable in the federal courts even when the district judge, with knowledge of the appeal waiver, states unequivocally that he wants the defendant to take an appeal on a Sentencing Guidelines issue (whether the district court has authority to grant a downward departure on the basis of extraordinary family circumstances), to the Supreme Court if necessary, and stays execution of the sentence pending determination of the appeal?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iv

DECISION BELOW 1

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES 1

STATEMENT OF THE CASE 2

INTRODUCTION 2

THE CHARGE, THE PLEA AGREEMENT, AND THE APPEAL WAIVER PROVISION 3

THE SENTENCING DETERMINATION 4

PROCEEDINGS IN THE COURT OF APPEALS, AND ITS DECISIONS 7

REASONS FOR GRANTING THE WRIT 9

THIS CASE – WHICH PRESENTS THE QUESTION WHETHER APPEAL WAIVER PROVISIONS IN FEDERAL PLEA AGREEMENTS ARE ENFORCEABLE EVEN WHERE THE DISTRICT JUDGE EXPRESSES DISSATISFACTION WITH THE SENTENCING OUTCOME HE BELIEVES TO BE DICTATED BY THE SENTENCING GUIDELINES, ADVISES THE DEFENDANT THAT HE CAN APPEAL, AND STAYS

EXECUTION OF THE SENTENCE TO PERMIT THE DEFENDANT TO APPEAL – RAISES IMPORTANT AND RECURRING QUESTIONS IMPLICATING THE SEPARATION OF POWERS 9

CONCLUSION 18

APPENDIX

Unpublished Decision of the Court of Appeals for the Second Circuit, dated October 26, 2004 ..... App. 1

Decision of the Court of Appeals for the Second Circuit denying petition for rehearing en banc, dated January 7, 2005 ..... App. 5

Decision of the Court of Appeals for the Second Circuit, dated May 3, 2005 ..... App. 7

Order of the Supreme Court of the United States, granting extension of time to file brief to and including June 6, 2005, dated March 23, 2004 ..... App. 9

TABLE OF AUTHORITIES

CASES

Ortega-Rodriguez v. United States,
507 U.S. 234 (1993) 11, 16, 18

People v. Stevenson,
231 N.W.2d 476 (Mich. App. 1975) 14

United States v. Allison,
59 F.3d 43 (6th Cir.),
cert. denied, 516 U.S. 1002 (1995) 12

United States v. Andis,
333 F.3d 886 (8th Cir.),
cert. denied, 540 U.S. 997 (2003) 11, 12, 15

United States v. Attar,
38 F.3d 727 (4th Cir. 1994),
cert denied, 514 U.S. 1107 (1995) 12

United States v. Booker,
543 U.S. ____, 125 S.Ct 738 (2005) ..... passim

United States v. Buchanan,
59 F.3d 914 (9th Cir.),
cert. denied, 516 U.S. 970 (1995) 15

United States v. Bushert,
997 F.2d 1343 (11th Cir. 1993),
cert. denied, 513 U.S. 1051 (1994) 12

United States v. Clark,
865 F.2d 1433 (4th Cir. 1989) (en banc) 13

United States v. DeSantiago-Martinez,
38 F.3d 394 (9th Cir. 1994),
cert. denied, 513 U.S. 1128 (1995) 12

United States v. Fleming,
239 F.3d 761 (6th Cir. 2001) 15

United States v. Gaskill,
991 F.2d 82 (3d Cir. 1993) 16

United States v. Hahn,
359 F.3d 1315 (10th Cir. 2004) (en banc) 10, 14

United States v. Johnson,
992 F.Supp. 437 (D.D.C. 1997) 12

United States v. Melancon,
972 F.2d 566 (5th Cir. 1992) 12, 14

United States v. Mezzanatto,
513 U.S. 196 (1995) 15

United States v. Morgan,
406 F.3d 135 (2d Cir. 2005) 9

United States v. Raynor,
989 F.Supp. 43 (D.D.C. 1997) 12, 16

United States v. Ready,
82 F.3d 551 (2d Cir. 1996) 15

United States v. Rivera,
971 F.2d 876 (2d Cir. 1992),
cert. denied, 525 U.S. 1047 (1998) 12

United States v. Ruiz,
536 U.S. 622 (2002) 13

United States v. Rutan,
956 F.2d 827 (8th Cir. 1992) 11, 12

United States v. Schmidt,
47 F.3d 188 (7th Cir. 1995) 12

United States v. Teeter,
257 F.3d 14 (1st Cir. 2001) 14

United States v. Yemitan,
70 F.3d 746 (2d Cir. 1995) 15

Wheat v. United States,
486 U.S. 153 (1988) 15

STATUTES AND RULES

28 U.S.C. § 1254(1) 1

U.S.S.G.
§ 5K2.0 3
§ 5H1.6 ..... 3, 4

Federal Rules of Criminal Procedure
Rule 11 (2000 ed.) 10, 11, 16

Advisory Committee Notes to Rule 11
(1999 Amendments) 11

OTHER AUTHORITIES

DOJ Criminal Resource Manual § 626(3) 10

David Carney,
"Waiver of the Right to Appeal Sentencing
in Plea Agreements with the Federal Government,"
40 Wm. & Mary L. Rev. 1019 (1999) 13

David Rudolf & Gordon Widenhouse,
"Renewing the Challenge to
Provisions Waiving the Right to Appeal,"
22-MAR Champion 51 (1998) 14

Robert Scott and William Stuntz,
"Plea Bargaining as Contract,"
101 Yale L.J. 1909 (1992) 13

Victor Chehebar respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit dismissing Petitioner's appeal in this matter.

DECISION BELOW

The Second Circuit's order dismissing Petitioner's appeal was filed on October 26, 2004, and is reproduced in the Appendix at App. 1. A timely petition for rehearing and rehearing en banc was denied on January 7, 2005, and is reproduced in the Appendix at App. 5. The mandate was held pending this Court's decision in United States v. Booker, 543 U.S. ___, 125 S.Ct. 738 (2005). (See App. 3)

On May 3, 2005, the Second Circuit ordered issuance of its mandate. It denied Petitioner's application for a remand to the district court in light of United States v. Booker, stating that the waiver of the right to appeal a sentence contained in a valid plea agreement is enforceable against appeals premised on Booker. (App. 7)

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The judgment of the United States Court of Appeals for the Second Circuit dismissing Petitioner's appeal was filed and entered on October 26, 2004. App. 1. A timely petition for panel rehearing or rehearing en banc, pursuant to Federal Rules of Appellate Procedure 35(b) and 40(a), was denied on January 7, 2005. App. 5. On motion of the Petitioner, this Court extended the time to file the Petition for a writ of certiorari to June 6, 2005. (App. 9)

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

INTRODUCTION

This case presents an important question regarding the separation of powers and the enforceability of a provision waiving the defendant's right to appeal contained in a plea agreement. The district judge sentenced the Petitioner pursuant to the Sentencing Guidelines prior to this Court's decision in United States v. Booker, 543 U.S. ___, 125 S.Ct. 738 (2005), and indicated that he wanted the defendant to pursue an appeal, to the Second Circuit and to this Supreme Court if necessary, notwithstanding the appeal waiver. Specifically, at sentencing, the district judge expressed dissatisfaction with the length of the sentence he believed himself bound to impose under the then-mandatory Sentencing Guidelines and with his perceived lack of authority to grant a downward departure under Second Circuit downward departure precedents, as he understood them.

The district court stayed the prison-term portion of the defendant's sentence to permit him to take an appeal on the critical issue: whether or not the district court had authority to grant a downward departure on the basis of the extraordinary family circumstances and extraordinary responsibilities presented.

The Court of Appeals for the Second Circuit dismissed the appeal, enforcing the appeal waiver, in spite of the district court's expressed desire that its ruling be subjected to review.

Petitioner respectfully submits that the Second Circuit's ruling deserves this Court's review. The enforcement of an appeal waiver, in a case where the district judge declares his wish that an issue he has been compelled to rule upon receive appellate review, raises important issues concerning appeal waivers in criminal cases and the relationship among the different branches of government.

The recent changes in federal sentencing law occasioned by this Court's decision in United States v. Booker make it especially appropriate that review be granted in this case. In the absence of an enforceable appeal waiver, Petitioner (whose case was on direct appeal when Booker was decided) is entitled to the benefit of the Booker ruling: re-sentencing under non-mandatory guidelines where the district judge would have had discretion to impose a sentence below the guidelines range, whether or not defendant's family circumstances and responsibilities were such that a downward departure under U.S.S.G. §§ 5K2.0 and 5H1.6 was permissible. Moreover, the Booker decision will likely increase the number of cases in which the government insists that the defendant waive his right to appeal as part of a plea agreement, insuring that appeal waiver questions will be recurring ones.

THE CHARGE, THE PLEA AGREEMENT, AND THE APPEAL WAIVER PROVISION

Petitioner pled guilty pursuant to a plea agreement to a single count information charging him with knowingly presenting false claims to the Department of Health and Human Services for neurology evaluations and services, in violation of 18 U.S.C. § 287. He fully and unconditionally accepted responsibility for his conduct.

The plea agreement stated "the defendant's sentence is governed by the United States Sentencing Guidelines Manual, effective November 1998" and set forth a likely, though not binding, offense level calculation resulting in an adjusted offense level of 16. The government agreed not to oppose a one-level downward departure for extraordinary acceptance of responsibility on the condition that the defendant make full restitution prior to sentencing. With that one level departure, the adjusted offense level would by 15, which yielded a guidelines

range of 18 to 24 months. Petitioner agreed not to challenge the calculation of the guideline range the agreement set forth.

The plea agreement permitted the defendant to move for a downward departure based upon his daughter's medical condition, and on no other ground.

The agreement also contained an appeal waiver provision which stated, "The defendant will not file an appeal or otherwise challenge the conviction or sentence in the event that the court imposes a term of imprisonment of 27 months or less."

THE SENTENCING DETERMINATION

The matter came before the sentencing judge, the Hon. Thomas C. Platt, on June 27, 2003, following the defendant's submission of a voluminous sentencing memorandum. The submission documented Dr. Chehebar's gifts as a physician, his dedication to his patients, and his patients' extraordinary gratitude and devotion to him, although no downward departure was sought on those grounds.

As contemplated by the plea agreement, Dr. Chehebar did seek a downward departure on the basis of extraordinary family ties and responsibilities U.S.S.G. § 5H1.6. In support of the application, he submitted information detailing the severe mental illness of his then-11-year old daughter, Brooke, and Brooke's special dependence upon him.

Judge Platt expressed the view that the circumstances presented were "not a ground for departure" but invited the parties to brief the matter, cautioning the defense to "bear in mind ... what Congress has been saying on the subject." Judge Platt expressed the view that, in its most recent decisions, the Second Circuit had responded to Congress's threats to eliminate downward departures entirely by reversing grants of downward departures based upon special needs of a vulnerable family

member and had made clear that such departures would be upheld only in the narrowest of circumstances.

The matter came on for sentencing on July 25, 2003, after submission of letter briefs. The court agreed with the defendant and the government that the appropriate adjusted offense level was 15, after a one level departure for extraordinary acceptance of responsibility. Defense counsel argued passionately for a downward departure on the basis of family circumstances, summarizing the lengthy presentation contained in the pre-sentence memorandum regarding the condition of the defendant's young daughter, and the defendant's essential and irreplaceable role in her care.

It was undisputed that Brooke had an extensive psychiatric history with long term emotional difficulties, and had been treated for mental illness since the tender age of six. At seven, she was diagnosed with an anxiety disorder and treated for abnormal anxiety, significant sleep problems, and school related problems. In 2002, Brooke received a diagnosis of bipolar disorder, a diagnosis that is "rare in childhood and . . . accordingly ominous." Brooke struggles with daily mood fluctuations, suffers from feelings of worthlessness and cognitive impairments, and exhibits impulsive behavior.

Brooke "characteristically looks to her father" in situations of distress. According to her doctor, the removal of her father could lead to long-term deterioration in her overall functioning, perhaps irreversible. The importance to Brooke of her father was made abundantly clear as his sentencing date approached. In the weeks prior to sentencing, Brooke's condition worsened to the point where her physicians were unable to effectively stabilize her with psychotropic drugs. She suffered a serious setback merely in anticipation of his sentencing and her potential separation from him.

Based on these undisputed facts, the defense argued that the case cried out for a downward departure – a child with extreme emotional problems and serious mental illness whose disease causes her extraordinary suffering. The child's doctors believe that her disease and her suffering would be exacerbated by removal of her father from the home and that the long-term course of the disease could be adversely affected by their separation. Because of her illness, she has an exceptional need for her father's presence. He is uniquely able to care for her, to reassure her, and to alleviate her suffering.

The sentencing judge reiterated the position he had articulated a month earlier, expressing the view that his hands were tied.

> The concept of extraordinary circumstances up to date in my view has never been stretched this far and I don't feel that I have power to blaze new law, particularly with the government's opposition and their right to appeal.

Judge Platt sentenced Dr. Chehebar to 18 months, the bottom of the guidelines range for a level 15 offense. Notwithstanding his awareness of the plea agreement's appeal waiver clause, he gave Dr. Chehebar the full right to appeal the sentence, advising him of his appellate rights and staying execution of the prison term until the appellate process was exhausted, including, if need be, an application to this Court.

> I'm going to stay the execution of the sentence on the doctor to give him full right to appeal to see whether three judges of the Court of Appeals, nine judges of the United States Supreme Court disagree with what I think has been the universal decision as to what constitutes extraordinary circumstance, and this will not fall in that category but I'm compelled to impose the

> minimum guidelines of 18 months under these circumstances....
>
> You have a right to appeal, as I say. I'm going to stay the execution of the sentence until your appellate rights are exhausted.
>
> I know it's no secret. You can argue to the Court of Appeals that the Judge doesn't agree with the guidelines. I'm not the only Judge. I think a great majority of the District Judges will agree with that proposition, but we're stuck.

Judge Platt again reiterated that he "was going to give [the defendant] the right to appeal," even after the prosecutor noted, "for the record," that there was an appeal waiver provision in the plea agreement.

PROCEEDINGS IN THE COURT OF APPEALS, AND ITS DECISIONS

The defendant timely filed his notice of appeal to the Court of Appeals for the Second Circuit. The government sat on any rights it may have had, moving to dismiss the appeal only after defendant's brief on the merits had been filed. The Second Circuit heard argument on the motion to dismiss, and then referred the motion to the merits panel. Briefing of the appeal was completed.

Prior to the scheduled oral argument on the merits, the merits panel denied the government's motion to dismiss the appeal, without prejudice to renewal of the motion after oral argument.

At oral argument the government mentioned its prior motion to dismiss but, following oral argument, the government

did not file any motion or other document seeking to renew its motion to dismiss.

By Summary Order dated October 26, 2004, a panel of the Second Circuit dismissed the appeal. It wrote:

> Chehebar contends that, at sentencing, the court struck down the appeals waiver provision through remarks indicting that Chehebar retained a right to appeal. We disagree. The court's 'remark[s] at sentencing as to the possibility of an appeal to challenge the Guidelines calculation [do not] vitiate' an enforceable appellate waiver in a plea agreement. United States v. Roitman, 245 F.3d 124, 126 (2d Cir. 2001). In addition, Chehebar argues that the court has the power to alter plea agreements using applicable principles of contract law and should do so here. Our authority to set a side a plea agreement's waiver provision is strictly limited. See United States v. Yemitan, 70 F.3d 746, 748 (2d Cir. 1995) (holding that a knowing and voluntary waiver bars defendant from arguing that the district court erred in sentencing him as long as the sentence is within the stipulated range.) Here, the district court insured that the waiver was voluntary and the sentence was imposed within he stipulated range. Therefore, we will not set aside the waiver. (App. 3)

The Court, however, held the mandate pending this Court's decisions in Booker and Fanfan, which were then pending before the Court. A petition for rehearing and rehearing in banc was denied. (App. 5)

By order dated May 3, 2005, the Court ordered that the mandate issue, stating that "the waiver of the right to appeal a

sentence contained in a valid plea agreement is enforceable against appeals premised on Booker," citing United States v. Morgan, 406 F.3d 135 (2d Cir. 2005). (App. 7)

REASONS FOR GRANTING THE WRIT

THIS CASE – WHICH PRESENTS THE QUESTION WHETHER APPEAL WAIVER PROVISIONS IN FEDERAL PLEA AGREEMENTS ARE ENFORCEABLE EVEN WHERE THE DISTRICT JUDGE EXPRESSES DISSATISFACTION WITH THE SENTENCING OUTCOME HE BELIEVES TO BE DICTATED BY THE SENTENCING GUIDELINES, ADVISES THE DEFENDANT THAT HE CAN APPEAL, AND STAYS EXECUTION OF THE SENTENCE TO PERMIT THE DEFENDANT TO APPEAL – RAISES IMPORTANT AND RECURRING QUESTIONS IMPLICATING THE SEPARATION OF POWERS

This case raises important questions concerning appeal waivers in plea agreements. This Court has never considered the validity of such waivers, and this case presents a particularly compelling case in which to grant such consideration. The case involves not merely a disagreement between the defendant and the government about the enforceability of the appeal waiver. In this case, the district judge, with full knowledge of the appeal waiver, expressed his firm desire that the sentence he believed he was compelled to impose under Circuit precedent be reviewed by a higher authority, in essence, voiding the appeal waiver clause in the plea agreement.

Had review proceeded, Dr. Chehebar's position would have been vindicated, for the district court's view that it lacked authority to grant a downward departure was wrong. Moreover,

under this Court's decision in Booker, the sentencing judge was incorrect in his belief that his sentencing options were constrained by the Sentencing Guidelines and the Circuit's interpretation of them. The district judge's beliefs as to the mandatory nature of the Sentencing Guidelines, the narrowness of a federal judge's authority to pronounce a sentence outside the range yielded by the guidelines, and the future of federal sentencing were all erroneous. In addition, under Booker, because Dr. Chehebar's case was on direct appeal when that case was decided, Dr. Chehebar would be entitled to the benefit of that ruling. Only the appeal waiver in his plea agreement stands in the way – and only because the Second Circuit decided to enforce that appeal waiver, notwithstanding the district court's expressed and unambiguous desire for appellate review of its ruling.

Review by this Court should be granted. This Court has never considered appeal waivers in the criminal context, or the circumstances under which they will or will not be enforced. The vast majority of federal criminal prosecutions are resolved by plea agreements, and many federal plea agreements contain provisions waiving the defendant's right to appeal (but not the government's).[1] See United States v. Hahn, 359 F.3d 1315, 1318 (10th Cir. 2004) (en banc).

In 1999, in recognition of "the increased use of appeal waiver provisions, due in part to the increasing number of challenges to sentencing decisions," Rule 11 of the Federal Rules of Criminal Procedure was amended to insure that, before a guilty plea is accepted, the defendant understands "the terms of

---

[1] See DOJ Criminal Resource Manual § 626(3) (noting that the use of a sentencing appeal waiver in a plea agreement to bar an appeal by the defendant does not require the government to waive its right to appeal an adverse sentencing ruling). The government did not waive its right to appeal in Petitioner's case.

any provision in a plea agreement waiving the right to appeal or to collaterally attack the sentence." Rule 11(c)(6)(2000 ed.)[2]

This Advisory Committee, noting that "a number of federal courts have approved the ability of a defendant to enter into such waiver agreements," took "no position on the underlying validity of such waivers." Advisory Committee Notes to 1999 Amendments. This Court has not addressed the validity of appeal waivers either.[3]

The policy reasons supporting an appeal waiver were summarized in United States v. Rutan, 956 F.2d 827 (8th Cir. 1992), overruled in part on other grounds, United States v. Andis, 333 F.3d 886, 896 (8th Cir.) (Bye, C.J., concurring), cert. denied, 540 U.S. 997 (2003) "The chief virtues of plea agreements are speed, economy, and finality. Waivers of appeal in plea agreements preserve the finality of judgments and sentences imposed pursuant to valid pleas of guilty. We also note that plea agreements are of value to the accused in order to gain concessions from the government." Rutan, 956 F.2d at 829 (internal citations omitted). (In addition, appeal waivers can conserve prosecutorial and judicial resources.

The Circuit Courts that have considered appeal waivers have upheld their validity, if entered into knowingly and

---

[2] The requirement was included in the 2002 revision of Rule 11, albeit slightly different language. See Fed. R. Crim. Pro. 11(b)(1)(N).

[3] In Ortega-Rodriguez v. United States, 507 U.S. 234 (1993), this Court considered dismissals of appeals under the fugitive disentitlement rule (that is, based on the defendant's conduct, not his agreement), upholding such dismissals only where they furthered important public policies.

voluntarily. See, e.g., United States v. Allison, 59 F.3d 43, 46 (6th Cir.), cert. denied, 516 U.S. 1002 (1995); United States v. Schmidt, 47 F.3d 188, 190 (7th Cir. 1995); United States v. Attar, 38 F.3d 727, 731 (4th Cir. 1994), cert denied, 514 U.S. 1107 (1995); United States v. Bushert, 997 F.2d 1343, 1350 (11th Cir. 1993), cert. denied, 513 U.S. 1051 (1994); United States v. DeSantiago-Martinez, 38 F.3d 394 (9th Cir. 1994), cert. denied, 513 U.S. 1128 (1995); United States v. Melancon, 972 F.2d 566, 567-568 (5th Cir. 1992); United States v. Rivera, 971 F.2d 876, 896 (2d Cir. 1992), cert. denied, 525 U.S. 1047 (1998); United States v. Rutan, 956 F.2d 827, 829-830 (8th Cir. 1992), overruled in part on other grounds, United States v. Andis, 333 F.3d 886, 896 (8th Cir.) (Bye, C.J., concurring), cert. denied, 540 U.S. 997 (2003).[4]

---

[4] The issue remains unresolved within the District of Columbia Circuit, two District of Columbia district judges having refused to enforce plea agreements containing appeal waiver provisions. In United States v. Raynor, 989 F.Supp. 43, 48 (D.D.C. 1997), Judge Paul Friedman refused to accept pleas including appeal waivers. Judge Friedman concluded that appeal waivers are inconsistent with the goals and intent of Congress and the goals and intent of the Sentencing Commission; they insulate from appellate review erroneous factual findings, interpretations and applications of the Guidelines by trial judges and thus, ultimately, undermine uniformity. ("The integrity of the system depends on the ability of appellate courts to correct sentencing errors, but the waiver provision at issue here inevitably will undermine the important role of the courts of appeals to correct errors in sentencing, a role that Congress has specifically set out for them."). See also United States v. Johnson, 992 F.Supp. 437, 439-40 (D.D.C. 1997) (Judge Harold H. Green, D.J.) (refusing to accept waiver of appeal rights provision because the plea agreement did not limit the government's right to appeal a sentence. "This glaring inequality strengthens the conclusion that this kind of plea agreement is a

The decisions broadly enforcing appeal waiver provisions have a common reasoning: the right to an appeal is a statutory right, not a constitutional guarantee. Since a defendant may waive his constitutional rights as part of a plea bargain agreement, including the right to a trial by jury and the right to be free from self-incrimination,[5] a defendant is certainly free to waive statutory rights, including the right to appeal.[6] See, e.g., United States v. Clark, 865 F.2d 1433, 1437 (4th Cir. 1989) (en

---

contract of adhesion. As a practical matter, the government has bargaining power utterly superior to that of the average defendant if only because the precise charge or charges to be brought – and thus the ultimate sentence to be imposed under the guidelines scheme – is up to the prosecution. To vest in the prosecutor also the power to require the waiver of appeal rights is to add that much more unconstitutional weight to the prosecutor's side of the balance." (Internal citations omitted)).

[5] See also United States v. Ruiz, 536 U.S. 622, 630 (2002) (plea agreement requiring defendant to waive right to receive impeachment information and information the government has regarding affirmative defense does not violate Constitution).

[6] Another legal argument made by proponents of the right to appeal sentencing is that a plea agreement is a contract and "classical contract theory supports the freedom to bargain over criminal punishment." Robert Scott and William Stuntz, "Plea Bargaining as Contract," 101 Yale L.J. 1909, 1910 (1992). Critics counter that the right-to-appeal sentencing waiver creates a condition that transforms an acceptable contract into an adhesion contract that should be void on general contract principles. See generally David Carney, "Waiver of the Right to Appeal Sentencing in Plea Agreements with the Federal Government," 40 Wm. & Mary L. Rev. 1019, 1033 (1999).

banc) (if defendants can waive fundamental constitutional rights, surely they can waive procedural rights granted by statute); United States v. Melancon, 972 F.2d 566, 566-68 (5th Cir. 1992).

Yet, it does not necessarily follow that the statutory right to appeal can be waived because it is "lesser" than a constitutional right, given the separation of powers and public policy issues that are implicated. The statutory provisions permitting sentencing appeals speak directly to the power of federal courts to review lower courts' sentencing determinations and are designed to implement Congressionally-mandated limitations on judicial authority in sentencing. These limitations on judicial authority arguably cannot be waived by the parties, especially since the result is the aggrandizement of the power of the executive branch. An appeal waiver insulates the prosecutor's office from judicial review, even though the judiciary is supposed to act as a check on the executive branch, and even though, through the Sentencing Reform Act, Congress intentionally removed the power of the district court judge to be the final word in the sentencing process. See People v. Stevenson, 231 N.W.2d 476 (Mich. App. 1975) ("[P]ublic policy forbids the prosecutor from insulating himself from review by either implicitly or explicitly bargaining away a defendant's right to appeal . . . . ."); David Rudolf & Gordon Widenhouse, "Renewing the Challenge to Provisions Waiving the Right to Appeal," 22-MAR Champion 51 (1998).

Even the Courts of Appeals that accept appeal waivers recognize that they do not foreclose appeals in all circumstances. See United States v. Teeter, 257 F.3d 14 (1st Cir. 2001) (Court of Appeals retains inherent power to relieve the defendant of appeal waiver where a miscarriage of justice occurs); accord United States v. Hahn, 359 F.3d 1315 (10th Cir. 2004) (en banc).

There is, however, no agreement among the circuit courts as to when an appeal waiver will be enforced. The Ninth Circuit has held that a defendant's appeal waiver is unenforceable where

(as in the instant case) the district judge has told the defendant during the sentencing proceedings that he has the right to appeal his sentence. United States v. Buchanan, 59 F.3d 914 (9th Cir.), cert. denied, 516 U.S. 970 (1995). But see United States v. Fleming, 239 F.3d 761, 765 (6th Cir. 2001) (criticizing Buchanan; "any pronouncement from the bench that seeks unilaterally to amend a plea agreement exceeds the court's authority under the Criminal Rules and is without effect."). There is, accordingly, a conflict in the circuits on the precise point this case presents.

Though the Second Circuit refused to accept the district court's invalidation of the appeal waiver provision in this case, that Court itself has recognized in both United States v. Yemitan, 70 F.3d 746, 748 (2d Cir. 1995), and in United States v. Ready, 82 F.3d 551, 559 (2d Cir. 1996), that "courts may apply general fairness principles to invalidate particular terms of a plea agreement." Though contractual, plea agreements are sufficiently different from other contracts to demand greater flexibility in their enforcement. United States v. Andis, 333 F.3d 886, 896 (8th Cir.) (Bye, C.J., concurring), cert. denied, 540 U.S. 997 (2003).

In deciding whether to enforce an individual's waiver of a right, courts must ask whether the right implicates institutional and societal values that transcend the individual's interest. Ready, supra 82 F.3d at 555. Some rights may not validly be waived. See, e.g., United States v. Mezzanatto, 513 U.S. 196, 204 (1995) ("there may be some evidentiary provisions that are so fundamental to the reliability of the fact-finding process that they may never be waived"); Wheat v. United States, 486 U.S. 153 (1988) (criminal defendant's right to have a lawyer free of conflicts of interest is not a waivable right, in part because such a conflict constitutes a breach of professional ethics and invites disrespect for the integrity of the Court).

An important Congressional goal under mandatory guidelines sentencing, a goal that this Court acted to protect

under the remedial portion of the Booker decision, is the achievement of consistency and uniformity in sentencing. See 125 S.Ct. at 766-67 (Breyer, J.) Broad enforcement of appeal waivers undermines the goal of uniformity. See, e.g., United States v. Raynor, supra. Cf. Ortega-Rodriguez v. United States, 507 U.S. 234, 249 (1993) (dismissal of appeal under the fugitive disentitlement doctrine as a second punishment for a defendant's flight is "almost certain to produce the kind of disparity in sentencing that the Sentencing Reform Act of 1984 and the Sentencing Guidelines were intended to eliminate." (footnotes omitted)

Thus, appellate review under the Guidelines, important as it is for individual defendants, also serves an important public interest in avoiding the sentencing disparities that were seen to be a great problems with the pre-Guidelines system. And, departures are an important part of the sentencing process because they "offer the opportunity to ameliorate, at least in some aspects, the rigidity of the Guidelines themselves." United States v. Gaskill, 991 F.2d 82, 86 (3d Cir. 1993).

This Court's decision in Booker does not undercut any of these arguments; rather it makes scrutiny of appeal waivers even more important. Plea agreements and appeal waivers will continue to proliferate, post-Booker. The "reasonableness" standard for review of federal sentences mandated by Booker is meaningless if no review whatsoever will occur on the basis of appeal waivers required by the government as a condition of a plea agreement. Yet, in its Booker decision, the court strove to preserve, so far as possible, the Congressional goal of sentencing consistency.

In this case, in particular, the Court of Appeals should not have treated the appeal waiver as an effective one because the district court affirmatively struck the appeal waiver provision in the plea agreement. Petitioner submits that doing so was well within the court's authority. Rule 11 (c) (3), (4), (5) of the

Federal Rules of Criminal Procedure permits district courts to accept or to reject a plea agreement. The power to reject includes the power to reject the plea agreement in part. With knowledge that the district court had voided the appeal waiver provision, the government made no application to withdraw from the agreement, but apparently accepted the agreement, with the excision the district court had ordered.

The Court of Appeals ruled, in essence, that the district court lacked power to do that, or, what is the same thing, that the appeal waiver provision was enforceable notwithstanding the district court's having set it aside. Respect for the work of district judges militates in favor of this Court's consideration of that Court of Appeals ruling. A district judge, at sentencing, shoulders a tremendous responsibility. When a district judge attempts to discharge the duty to apply the law as he or she understands it to have been established by a higher court, but wants appellate review so that the issue may be reconsidered, his or her wish should not be trumped by an executive branch's decision to seek to enforce an appeal waiver. In these circumstances, there is no bar, statutory or otherwise, to appellate review. And there is no unfairness to the government in permitting an appeal. The government's interest in avoiding devoting resources to defending such an appeal are outweighed by the societal interest in having important legal questions properly determined through the process of appellate review.[7] Nor is protection of judicial resources a good or sufficient reason

---

[7] In this particular case, there is surely no unfairness. Under the plea agreement, fairly read, the government contemplated that the defendant would move for a downward departure based on exceptional family circumstances – and that the court would exercise its discretion to either grant or deny the departure. That the sentencing court would conclude that it lacked authority to downwardly depart was a circumstance not contemplated by either party.

to enforce an appeal waiver that the district court has set aside. "[T]he reason appellate resources are precious is that they serve the purpose of administering evenhanded justice." Ortega-Rodriguez, supra, 507 at 249, n. 22. Appeal waivers frustrate that vital goal.

CONCLUSION

For the reasons set forth, the writ of certiorari should be granted.

Respectfully submitted,

Alan M. Dershowitz
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 496-2187

Nathan Z. Dershowitz*
Victoria B. Eiger
DERSHOWITZ, EIGER
& ADELSON, P.C.
220 Fifth Avenue
Suite 300
New York, NY 10001
(212) 889-4009

* Counsel of Record

Dated: June 2, 2005